The reasoning of this decision is based firstly on a proposition of law summed up by Lord Mansfield as "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" and Fisher, J. concluded that "the prosecutrix could not have recovered by civil process the money with which she entrusted the prisoner." But the former of these propositions has no application to the criminal law; and the latter is incorrect. It is clear law that the money could have been recovered back by the prosecutrix at any time before the illegal purpose was carried out [*Taylor* v. *Bowes*, (1876) 1 Q.B. 291] and in our case, as in the Penang case *ex hypothesi* the illegal purpose was never carried out. Fisher, J. relies next on *R.* v. *Hunt*, 8 C. & P. 642, but that case merely turned on the difficulty of laying in the indictment the ownership of the property embezzled; a difficulty which does not concern us. It was not followed in *Reg.* v. *Stainer*, (1870) 11 Cox 483 nor *Reg.* v. *Tankard*, (1894) 1 Q.B. 548, but these cases do not help us because they are under a special Act. It was not followed too by O'Malley, C.J. in *Reg. on the prosecution of Arshit* v. *Kassim*, 1891 Straits Law Reports 84, and Fisher, J. does not appear to have considered this case.

The third ground of the decision is that there was no dishonesty. The learned Judge held that the complainant having no civil remedy, has suffered no wrongful loss; and then he goes on to say:—

> "On the other hand it seems *prima facie* arguable that the defendant has 'done something with the intention of causing wrongful gain to another,' i.e., himself, because he has clearly gained by means which would seem unlawful, property to which he was not legally entitled. But as his 'wrongful gain' if that is so, is the exact measure of the complainant's not 'wrongful' loss, and as it was acquired by the breach of a promise which was never binding, but void *ab initio* because its performance would have been unlawful, it seems difficult to see how he can logically be convicted under the other head of the section either."

But we are unable to follow this reasoning. It seems to us perfectly plain that when a person who has received $4 to bribe a detective, puts that $4 into his own pocket, he has wrongfully gained that $4, apart from all question of wrongful loss by the complainant.

We are of opinion therefore that this case was wrongly decided; no other authority for the proposition has been cited to us, and for the decision of the present appeal we are content to rely on the plain wording of section 405 of the Penal Code:—

> "Whoever being in any manner entrusted with property....."

which is clearly wide enough to cover the present case; and we see no reason by refining the plain meaning of these words to allow a man to escape punishment for one crime because he has conspired with the complainant to commit another.

The appeal should be allowed and the order of acquittal set aside and the case should be remitted to another Magistrate to be tried on its merits.

Appeal allowed.

[APPELLATE CRIMNIAL JURISDICTION.]
BURTON, AG. C. J.
September 24, 1935.

REX v. MOHAMED BIN SUDIN & ANOR.

[SINGAPORE MAGISTRATE'S APPEAL No. 26 of 1935]

Criminal Procedure Code Section 309.

Under Section 309 of the Criminal Procedure Code the Court in the due exericse of its discretion will decline to give a successful respondent the costs of the trial unless it is shown that the prosecution was vexatious, that is, begun or continued without reasonable and probable cause or frivolous.

Stubbs v. *The Director of Public Prosecutions*, (1890) 24 Q.B.D. 577 followed.

Magistrate's appeal.

The accused were acquitted by a Magistrate on charges of bribery and the Crown appealed against the acquittal. The appeal was dismissed without the Respondents being called on whereupon the Respondents' counsel applied for costs.

Worley (D.P.P.) for the Crown.

Page for Respondents.

The facts and arguments are sufficiently set out in the Judgment below.

Cur. Ad. Vult.

BURTON, AG. C.J.—The two accused were acquitted on charges of bribery by the second Magistrate and the Crown appealed. I dismissed the appeal without calling on the respondent, and Mr. Page then applied for costs under section 309 of the Criminal Procedure Code. The Code gives an absolute discretion to the Court in awarding costs but it is difficult to discover on what principle they should be awarded. The only recent case in the Colony in which costs have been awarded against the Crown in an appeal from an acquittal is *R.* v. *Ramasamy*, (1930) S.S.L.R. 104. But in that case Murison, C.J. accepted the principle of the Indian Courts that an appeal on the facts in a criminal case should not be entertained unless there has been such stupidity and perversity by the trial judge, or that he has so obstinately blundered or gone wrong that a miscarriage of justice has occurred. But this principle has recently been overruled by the Privy Council in *Sheo Swarup* v. *the King-Emperor*, 51 T.L.R. 10 who held that no such limitation is placed on the power of the Courts. Murison, C.J's judgment on the question of costs must have depended on his view of the law. He says:

> "For a trial judge this was no doubt a borderline case; but for me as an appeal judge I find no difficulty whatever."

He thought that the appeal had no remote chance of success. It is clear that the principle has never been admitted that costs follow the event: there must be some exceptional circumstance. In the case of *Stubbs* v. *the Director of Public*

Prosecutions, (1890) 24 Q.B.D. 577 at p. 581 Cave, J. said:

> "If the prosecution was not vexatious in its inception, but has failed by reason of the difficulty of proving the case, or even by reason of the intervention of the director of public prosecutions, those seem reasons, not why the director of public prosecutions should pay the costs, but why the defendant should not get his costs, and unless it was shewn that the prosecution was vexatious, that is, begun or continued without reasonable and probable cause, or frivolous, I imagine that the Court, in the due exercise of its discretion, would decline to give the defendant the costs of the trial."

In this appeal the Deputy Public Prosecutor showed quite clearly that the Magistrate had imported into this case facts which he had learned in another case; and he threw doubt on another conclusion of the Magistrate. But the main conclusion of the Magistrate was that from Ong Yang Su's general demeanour in giving evidence he considered that "he is a scallywag and unworthy of credit." Ong Yang Su was the principle witness for the prosecution, and if his evidence was disbelieved the prosecution case must collapse. The Magistrate disbelieved it, and it is difficult to see that the Crown had much chance of succeeding in the face of that finding. The appeal was not frivolous; but if the appellant can show that it was brought without reasonable and probable cause. I think that his case will come within the words of Cave, J. which I have quoted and that he should be given the costs of this appeal. Whether he is or not, is a question which I have had great difficulty in deciding. But it is difficult to see how the Crown could have hoped to succeed in face of the emphatic finding of fact by the learned Magistrate. The recorded evidence leaves me quite in doubt, but the evidence of Robert Caldwell was also recorded. an Assistant Superintendent of Police who said of Ong Yang Su:

> "I took a statement from that man. I sent for him to come and see me. He did not give me a satisfactory statement."

With this on the record. and the case depending almost entirely on Ong Yang Su's evidence which was so emphatically disbelieved, I think that the words of Murison, C.J. in the case of *R.* v. *Ramasamy (ubi sup)* which I have already cited apply and that the respondents therefore should have the costs of this appeal, fixed at $75.

Order accordingly.

Solicitors for the Respondents—*Allen & Gledhill.*

[CRIMINAL REVISIONARY JURISDICTION]
TERRELL. J.
August 8. 1935.

REX v. TALIB BIN SAIMAN

[SINGAPORE MISCELLANEOUS APPLICATION No. 4 of 1935]

Ordinance No. 61 (Pawnbrokers) section 28.

When a magistrate is proceeding under section 28 of Ordinance No. 61 (Pawnbrokers) to determine the rights of parties to the pawned property, he should only do so in the presence of the parties. When an owner puts an agent in possession of an article as a mercantile agent, the agent can either sell or pledge the article and a pawnbroker dealing with such agent in good faith is not liable to have his security defeated.

Application for Revision of order made by a Police Magistrate.

Walters, for the Applicants (Pawnbrokers).

Worley, Deputy Public Prosecutor, for the owner of the pawned property.

The facts and arguments sufficiently appear from the Judgment.

Cur. Ad. Vult.

TERRELL, J.—The facts of the case are perfectly simple. At 9 a.m. on the 9th April, 1935 one Hamid bin Hadji Bakar (hereinafter called the complainant), wishing to dispose of an American gold dollar and being unable to obtain more than $60 for it, handed it to one Talib bin Saiman who said he could sell it for at least $65. The conversation according to complainant took place outside a pawnbroker's shop at the corner of Arab Street and North Bridge Road, and the arrangement was that Talib should meet him again at 1 p.m. the same day and either bring the money or return to him the gold coin.

Talib however kept the gold coin and not the appointment and eight days later pawned it for $50 to the Thai Loy pawnshop. On the 2nd May. 1935 the complainant made a report at the Beach Road Police Station and Talib was duly arrested and charged with criminal breach of trust of an American gold Dollar valued at $60. On the 24th May, 1935 he pleaded guilty and on the 29th May he was sentenced to three months rigorous imprisonment. The gold coin was ordered to be restored to the complainant.

The gold coin was taken from the pawnshop by the Inspector who was in charge of the case on the 31st May, 1935 in exchange for a receipt, but the owner of the pawnshop was never notified of the proceedings and the order disposing of the property was made in his absence.

First as regards procedure. Under section 28 of Ordinance No. 61 (Pawnbrokers) a police court has power when a person has been convicted, to make an order dealing with the pawned property. A similar power is given in England by the Pawnbrokers Act 1872 section 30, and the object is to benefit prosecutors by saving them from the necessity of bringing civil proceedings to recover their property. At the same time the owner or claimant has the alternative of taking civil proceedings [*Leicester & Co.* v. *Cherryman*, (1907) 2 K.B. 101]. If however the Magistrate proceeds to exercise his powers under section 28 to determine the civil rights of parties, it is obvious that he should only do so in the presence of the parties. There is in fact a recent decision of the Full Court to that effect [*Rex* v. *Lam Lock*, (1933) S.S.L.R. 58; 2 Mal.L.J. 92]. As the learned Magistrate omitted to notify or to hear the pawnbrokers, they have petitioned the Court and the matter is brought up on revision. The complainant was also present at the hearing and all necessary parties therefore were before the Court.